

the year 1845, or any other period, it was for them to show it by proof, and in the absence of proof it is not to be presumed.

The defendant's fourth exception must also fall, because it objects to the average made by the Auditor of the proof of the witnesses in regard to the credits. In his average he has included the testimony of Mary Ann McPherson, and has given the proper weight to it.

My opinion, then, is, that the account D., accompanying the report of the Auditor of the 9th of July last, is stated upon proper principles, and it will be confirmed, and the only other question has respect to the form of the decree. That is, whether the sum which shall be decreed to be paid by the defendants, shall be charged against them *in solido* or distributively. It may be that under the last opinion of the Court of Appeals this court is not prohibited from adopting the former mode of securing to the complainant the benefit of the lien given him by the devise in his father's will, but it is most certain the appellate court express a decided preference for the latter form of relief, and it will therefore be adopted, so far as the arrears are concerned. To prevent injustice, however, the decree will declare the whole sum in arrear a charge on the entire real estate, such being the express judgment of the Court of Appeals.

The decree, then, will provide that each defendant shall pay the complainant, or bring into this court to be paid him the sum stated in the memorandum appended to the said account, D., with interest on the proper proportion thereof. That in default of payment by any one of them, his share of the estate charged with the lien shall be sold, and the proceeds brought into court for disposition, and that in the event of the inability of any one of the defendants to pay his proportion, the complainant shall be at liberty to apply to the court for such order or decree against the others, as may be necessary.

And the decree will also provide for the payment by the defendants to the complainant of an annuity of one hundred and ninety dollars during his life, in semi-annual payments, commencing from the 1st of July, 1853, and for his costs to be